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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1971

No. 71-218

RALPH GROUNDS, HENRY HITCH, et al.,
(LANDOWNERS),
Petitioners,

vs.

NORTHERN NATURAL GAS COMPANY, et al.,
(HELEX GROUP),

AND

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted), et al.,
(LESSEE-PRODUCERS),
Respondents.

BRIEF OF NORTHERN NATURAL GAS COMPANY, et al., IN RESPONSE TO LANDOWNERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF NORTHERN NATURAL GAS COMPANY, et al., IN RESPONSE TO LANDOWNERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This response is to the Landowners' Petition for a Writ of Certiorari filed on behalf of Northern Natural Gas Company, Northern Helex Company, Northern Gas Products Company, Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc., members of the "Helex Group" of respondents.

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The petition herein seeks review from the same judgments and opinion of the United States Court of Appeals for the Tenth Circuit involved in pending petitions for certiorari in *Northern Natural Gas Company, et al.* v. *Mobil Oil Corporation, et al. and Ralph Grounds, et al.*, No. 71-238, and *Panhandle Eastern Pipe Line Company and National Helium Corporation* v. *Mobil Oil Corporation, et al. and Ralph Grounds, et al.*, No. 71-243. The record has been filed in No. 71-238 and the opinions below, the jurisdictional statement, the constitutional provision, statutes, and rules of court involved are set forth fully in the petition for writ of certiorari and appendix thereto filed in No. 71-238.

QUESTIONS PRESENTED

1. Whether the trial court and the Court of Appeals correctly held that oil and gas leases which grant to the lessees the right to produce, save and take care of gas also include the right to produce, save and take care of the helium constituent of such gas?

2. If not, whether the landowner-lessors are nevertheless bound by the marketing contracts of their lessees-producers which convey and warrant title to the entire gas stream delivered to the pipeline purchasers, including the helium constituent?

3. Whether the lessee-producers are liable to their respective pipeline purchasers under the warranty provisions of such marketing contracts?

STATEMENT OF THE CASE

This case arose out of consolidated actions brought under the Tort Claims Act, the Tucker Act and the federal interpleader statute to determine conflicting claims of title to the helium constituent of helium-bearing natural gas produced from the Hugoton gas area by independent producers operating under oil and gas leases granted by the landowners. The independent producers sell and deliver such helium-bearing natural gas to the natural gas pipeline companies on a volumetric basis under gas sales contracts which make no provision for the separate sale or disposition of the helium constituent. The helium constituent is subsequently extracted from such helium-bearing natural gas and sold by helium extraction companies to the United States.

A. The Oil and Gas Leases.

With respect to the oil and gas leases, the trial court found (Appendix to the Petition herein ["App."], pp. 99-100):

". . . All the landowners have done is to execute leases drawn by the lessee, and receive the fractional royalty by lessee on all gas produced, without qualifying or limiting the gas upon which such royalty is payable. Royalty clauses typically require payment of a fractional royalty, usually one-eighth, of the proceeds of the gas sold at the well, or if marketed off the lease premises, one-eighth of the market value of the gas at the wellhead. The nearly universal practice is to measure the volume of gas produced from the well by an orifice meter placed at or near the wellhead, which meter measures the entire volume of gas passed through the meter. The royalty is the product of a price stated per Mcf of gas multiplied by the number

of Mcf passing through the meter. So, the pertinent conduct of the landowners is to have received payment for many years of a royalty based and computed on the total volume of gas produced, without objecting that the lessee was not entitled to all of the volume for which he tendered payment.

"Likewise, lessee-producers have dealt with the total stream produced from the well, without regard to its separate constituents. They have produced it as a single stream, measured it thus and computed royalty payments on a volumetric basis."

B. The Gas Sales Contracts.

With respect to the gas sales and purchase contracts between the independent producers and the pipeline purchasers, the trial court made the following findings, among others (App. 103-107, footnotes omitted):

"Insofar as pertinent herein, the typical contract contains a recital clause, a definition of gas, a dedication or commitment of described acreage, reservations therefrom and processing rights, if any, statements of the quantities to be produced and delivered, pricing provisions, Btu rejection and/or price adjustment clauses, quality standards, provisions for standards and methods of measurement, billing and payment procedures, and warranties of title."

* * *

"Definitions of gas are expressly comprehensive, and refer typically, for example, to 'all gas produced from gas wells including, all gases indigenous to the reservoir . . .;' or 'the entire stream flowing from a well including all compounds, elements, and mixtures indigenous to the reservoir . . .;' or 'raw natural gas indigenous to the reservoir' or 'raw natural gas, without removal of any of

its constituents.' Gas and natural gas are used interchangeably throughout these contracts with the same meaning.

"Dedication or commitment clauses describe the acreage or wells from which gas is committed to performance of the contract. Every commitment clause contained in a Panhandle contract with a named lessee-producer specifically dedicates all gas which is produced, or which can be commercially produced, or in which seller has an interest. Leases under which production is committed are generally identified in the contracts by legal description of the acreage, name of lessors, dates of leases, and the name and percentage interest of the seller. These dedication or commitment clauses made no distinction as to the composition of gas from the committed acreage.

"From gas from the committed acreage, there may be reserved to the seller oil, casinghead gas, gas used in lease operations, liquid hydrocarbons, oil or condensate removed by separators, and liquefiable hydrocarbons, all removed according to specific processing rights elsewhere in the contract. It is the practice in the industry that no seller of gas retains rights to process the stream for removal of any of its constituent parts, such as gasoline, or liquid or liquefiable hydrocarbons unless the right is specifically reserved to him in the contract. Six Panhandle contracts, all executed since 1963, reserve to the seller the right to process the gas stream for the extraction of helium, but that if he fails to do so, or to commence extraction within a given period of time, its rights under that reservation terminate.

"Statements of quantity to be produced are typically stated in terms of volume. Production from pro-rated wells, of course, is determined by the production allowances assigned by state regulatory bodies. For non-prorated wells, annual production is frequently stated by the

contract to be at an annual rate which will cause depletion of the well within a period of years, commonly twenty; non-prorated production may also be stated to be in volumes ratable with all other wells connected to the buyer's system producing from a common source of supply.

"The price is universally stated in cents per thousand cubic feet (Mcf), and the unit of measurement is typically stated as '1000 cubic feet (Mcf) of gas at a temperature of sixty degrees (60°) Fahrenheit and an absolute pressure of fourteen and sixty-five hundredths pounds per square inch (14.65 psia).' "

* * *

"Billing is generally provided to be by monthly statements showing the amount in volumes of gas delivered during the preceding month.

"We find no contract in which the seller does not warrant title to the gas delivered to the buyer. Such warranties typically extend to all gas delivered."

C. Proceedings Below.

On the merits, the District Court held that the grant of gas in each of the oil and gas leases herein passed title to the entire gas stream, including the helium constituent, from the landowners to the lessee-producers (e.g., App. p. 102), and that the gas purchase and sales contracts likewise passed title to the entire gas stream delivered, including the helium constituent, from the lessee-producers to the pipeline purchasers (e.g., App. p. 139). The Court of Appeals affirmed on the title questions (App. pp. 164 and 171) and then reversed the trial court on the alternate *in personam* claims of the independent producers under Section 11 of the Helium Act Amendments. (The latter rulings are the subject matter of the petitions for certiorari pending in Nos. 71-238 and 71-243, this Term.) As the

trial court and the Court of Appeals ruled squarely in favor of the pipeline purchasers and the United States on all issues of title, it was not necessary for the courts below to reach the alternative issues of whether the landowner-lessors were independently bound by the producers' marketing contracts which both courts found to convey and warrant title to the entire gas stream delivered to the pipeline purchasers.

ARGUMENT

In the event that a writ of certiorari is granted herein, these respondents intend to exercise the opportunity to respond not only to the landowners' petition on the merits, but also to press their earlier contentions with respect to additional issues which were raised below to defeat recovery by the adverse claimants of title to the helium constituent (R.App. Vol. I, pp. 35, 36-37, 89-90, 95, and 98).

1. The title claims of the petitioning landowners are predicated on the construction of various forms of conventional oil and gas leases which were considered at length by the trial court (App. pp. 80-102) and by the Court of Appeals (App. pp. 152-165). Both courts correctly held against the contentions of the landowners on such title issue (App. pp. 102 and 164), and the opinion by the Supreme Court of Oklahoma here relied upon by the landowners (App. p. 193) is not inconsistent therewith. Therefore, if certiorari is granted herein these respondents will exercise the opportunity to respond to the landowners' petition on the merits.

2. Landowners are or represent the lessors in the oil and gas leases involved. In some such leases there may be found an express covenant on the part of the lessee-producer to market the gas produced. The necessity of

such a duty is obvious in order that the lessor may receive the consideration for the lease, that is, the royalties which are to be paid when the gas is delivered into a pipeline. In the absence of such a duty, the courts, on the same theory that they imply covenants to test and develop, imply a covenant on the part of the lessee to market the gas produced. While there are many authorities supporting this general theory of the law, illustrative thereof see *Howerton* v. *Kansas Natural Gas Co.* (Kan. 1910), 81 Kan. 553, 106 Pac. 47, 34 LRA n.s. 34; *Gaxin* v. *Pan American Petroleum Corporation* (Okla. 1962), 367 P.2d 1010, and *Cole Petroleum Co.* v. *United States Gas & Co.* (Texas 1931), 41 S.W. 2d 414, 86 A.L.R. 719.

In compliance with such implied covenant on the part of lessee-producer to market the gas produced, producers here involved executed gas sales contracts to the respondent pipeline purchasers, completing the chain in the instruments for the marketing of the gas as produced. Having passed title to such gas to the pipeline purchasers neither the landowner-lessors nor the lessee-producers had any further interest in it. *Kretni Development Co.* v. *Consolidated Oil Corp.*, 74 F.2d 497 (Tenth Circuit), certiorari denied 295 U.S. 750; *Greenshields* v. *Warren Petroleum Corporation*, 248 F.2d 61 (Tenth Circuit). Also see *Utilities Production Corporation* v. *Carter Oil Co.*, 72 F.2d 655 (Tenth Circuit). Accordingly, if certiorari is granted herein these respondents intend to urge that the landowners are independently bound by the marketing contracts of their lessee-producers.

3. Each of the gas purchase and sales contracts between the respondent independent producers and the natural gas pipeline company purchasers involved in these proceedings contain explicit provisions whereby the independent producers warrant title to all gas *delivered* to the

pipeline companies and agree to indemnify the pipeline companies against all adverse claims made with respect to all such gas delivered (App. p. 107). As the courts below ruled in favor of the pipeline purchasers and the United States on the issue of title to the helium constituent of the helium-bearing natural gas delivered, it was not necessary to reach the warranty issues. However, if certiorari is granted and because the landowners seek to reargue the title issue herein, these respondents preserve their earlier contention that in any event the independent producers must be held to be liable to their pipeline purchasers under the warranty and indemnity provisions of their gas purchase and sales contracts.

CONCLUSION

Although we are of the opinion that the title issues were correctly decided below, in the event that certiorari is granted to the landowners, these respondents request an opportunity to respond to the petition on the merits and to urge the additional issues set out above.

Respectfully submitted,

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